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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. 538

SUNBEAM CORPORATION, a Corporation,
Petitioner,

v.

S. A. WENTLING, Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and Brief in Support Thereof.

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF PETITION

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BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF PETITION.

The Commonwealth of Pennsylvania adopts the brief heretofore filed by the petitioner in this case, but submits additional facts to show that Pennsylvania has a direct and substantial interest in the questions involved in this case.

STATEMENT OF THE CASE.

The Pennsylvania Fair Trade Act of June 7, 1935, Pamphlet Laws p. 266, as amended by the Act of June 12, 1941, P. L. 128, 73 Purdon's Penna. Stat. Secs. 7 and 8 (quoted in Appendix D, page 21a, of Petitioner's brief), is substantially the same as the Fair Trade Act of Louisiana, which is involved in *Schwegmann Brothers v. Calvert Distilleries Corp.*, No. 442 and *Schwegmann Brothers v. Seagram Distilleries Corp.*, No. 443, of October Term, 1950, in which certiorari was granted on February 26, 1950.

Pennsylvania is an industrial state. Its vast production of raw materials and supply of skilled labor provides facilities for the manufacture of innumerable trade-marked and branded articles which are sold and shipped into all the states of the Union. If the Pennsylvania Fair Trade Act is limited by construction to sales made within its territorial limits, as the Court of Appeals ruled in this case, its industries could not develop the quantity of production and lower costs or provide the funds for research and improving the quality of an article, which are made possible by a larger volume of sales. By far the greater portion of the trade-marked and branded articles produced in Pennsylvania are sold to purchasers in other states, which have Fair Trade laws. Ability of the Pennsylvania manufacturer to stabilize the price of his article is necessary to protect the quality and efficiency of his products and does not confer upon him a monopoly. His product is still obliged to meet the keenest competition of other manufacturers of similar articles.

ARGUMENT.

Forty-five states, including Pennsylvania, have enacted Fair Trade laws, which provide that—

(1) The purchaser of an article bearing a trade-mark or brand shall not resell at less than a price fixed by the seller, and that the purchaser in the event of a resale by him, will require the same agreement from the party purchasing from him;

(2) A buyer who knows of this price restriction may not resell at a lower price, whether or not he is a party to such an agreement.

In order to remove the prohibition of the Sherman Anti-Trust Act from, and to permit each state to adopt its own policy as to, such contract, Congress enacted the Miller- Tydings Amendment to the Sherman Anti-Trust Act. This amendment provided that the provisions of the Sherman Anti-Trust Act should not render illegal agreements prescribing minimum prices for the resale of a trade-marked or branded article—

> "* * * when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition * * *." (Quoted on page 20a of Petitioner's brief.)

The purpose of this amendment was clearly and authoritatively stated in Report No. 382 submitted by the Committee on the Judiciary to the House of Representatives and recommending the adoption of this amendment.

This report stated:

"The sole objective of this proposed legislation is to permit the public policy of States having 'fair trade acts' to operate with respect to interstate contracts for the resale of goods within those States. The fair-trade acts referred to legalize the maintenance, by contract, of resale prices of branded or trade-marked goods which are in free competition with other goods of the same general class.

"To accomplish this end, the reported bill amends section 1 of the Sherman Antitrust Act which declares every contract in restraint of trade illegal. The amendment adds a sentence to the section, in the nature of a limitation, to the effect, in substance, that nothing therein contained shall render illegal contracts prescribing minimum prices or other conditions for resale of branded or trade-marked goods when such contracts are lawful as to intrastate transactions under the State law of the State in which the resale is to be made; and that the making of such contracts shall not be an unfair method of competition under section 5 of the Federal Trade Commission Act.

* * * * * * *

"State fair trade acts typically provide, first, that contracts may lawfully be made which provide for maintenance by contract of resale prices of branded

or trade-marked competitive goods. Second, that third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.

* * * * * * *

"Your committee respectfully submit that sound public policy on the part of the Federal Government lies in the direction of lending assistance to the States to effectuate their own public policy with regard to their internal affairs. It is submitted that this is especially true where such assistance, as in this instance, consists of removing a handicap resulting from the surrender of the power over interstate commerce by the States to the Federal Government." (Italics added)

This Miller-Tydings Amendment is purely *permissive.* It removes any doubt as to the legality of contracts fixing minimum prices in so far as the Sherman Anti-Trust Act and the policy of Congress are concerned. Legislation by a state is still necessary to remove illegality under the common law and to provide means of enforcement.

Technically the Miller-Tydings Amendment establishes an exception to the Sherman Anti-Trust Act; but fundamentally its purpose was to make it possible for each state to formulate its own public policy with reference to price restriction upon the sale of trade-marked or branded articles which enter or leave the State *through the channels of interstate commerce.*

We cannot believe that the legislature of Pennsylvania intended (1) to permit manufacturers to impose

a minimum price restriction upon goods sold *intrastate,* and, at the same time (2) to permit dealers of other states to flood Pennsylvania territory with the identical articles at cut prices.

In the instant case, District Court Judge Follmer, construed the Miller-Tydings Amendment and the Pennsylvania Fair Trade Act and held that the Pennsylvania statute applied to the defendant dealer who had not signed plaintiff's restrictive contract but had received a copy of such contract and of plaintiff's price list and was engaged in selling plaintiff's products at cut prices to purchasers in other states.

The District Judge construed the Pennsylvania Fair Trade Act as applying to interstate sales to purchasers in another state.

The Court of Appeals held that the Pennsylvania statute applied only to intrastate sales, and reversed.

In the two Schwegmann cases, Chief Judge Hutcheson and Circuit Court Judge McCord of the Fifth Circuit, held that the Sherman Anti-Trust Act, as amended by the Miller-Tydings Act, did not make invalid contracts fixing minimum prices for resale to a purchaser in another state, as authorized by the Louisiana Fair Trade law; and further held that the sellers' price list could be enforced against a resale by a purchaser who had notice of it but had not signed a Fair Trade contract.

Circuit Judge Russell dissented on the ground that the Miller-Tydings act only applied to a purchaser who had signed a price-restricting contract and that as to a non-signing purchaser the contract was in violation of the Sherman Anti-Trust Act.

The ruling of the Third Circuit in the instant case, is directly in conflict with the ruling of the Fifth Circuit in the Schwegmann cases, in respect of (1) the construction and legal effect of the Miller-Tydings Amendment; and (2) the construction of the Fair Trade Laws of Pennsylvania and Louisiana, which are substantially identical.

In the instant case, the opinion of the Court of Appeals in construing the Pennsylvania act as applying to intrastate sales only, was based not upon the language by the Pennsylvania statute, but upon the ground that—

> "These grave constitutional difficulties involved in any broader interpretation lead us to the conclusion that the Pennsylvania Fair Trade Act is to be construed as not to apply to sales by Pennsylvania retailers to consumers in other States, * * * We are reinforced in this conclusion by the well-established line of authority which interprets a statute to conform to constitutional limitations whenever it is possible to do so." (Petition 19a)

Construing the Pennsylvania statute as applying only to intrastate sales, as completely deprives the plaintiff-vendor in the instant case of the benefit of the Miller-Tydings Amendment as if the court had declared the Miller-Tydings Act inapplicable or the Pennsylvania statute unconstitutional.

If the Court of Appeals had construed the Pennsylvania Fair Trade Act and held it to be unconstitutional, its action would have been contrary to the well-established principle that this court will not decide a question of the constitutionality of a State statute until such statute has been construed by the State courts.

This court is asked to review the instant case because its decision in the Schwegmann cases will not necessarily decide this case, although the fundamental question of the effect of the Miller-Tydings Amendment is common to both this case and the Schwegmann cases.

In addition, in the instant case the Court of Appeals ruled that the Pennsylvania Fair Trade Act did not cover interstate sales. In the Schwegmann cases the dissenting opinion of Circuit Judge Russell held that the substantially identical Fair Trade Act of Louisiana did not cover non-signers. The adoption of either of these views would largely defeat the purpose of the Fair Trade Acts of those and many other states.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911) this court decided that a contract between a manufacturer and his dealers, which fixed the prices at which his dealers might sell its proprietary medicines was unlawful both (1) at common law and (2) under the Sherman Anti-Trust Act.

Since this decision two fundamental changes in the law have been brought about:

(1) Fair Trade Acts of 45 states have expressly declared that minimum price contracts be lawful; that non-signers are bound thereby; and

(2) The Miller-Tydings amendment has expressly provided that the Sherman Anti-Trust Act shall no longer render such contracts illegal. 42 states had adopted such Fair Trade acts before the enactment of the Miller-Tydings amendment and the purpose of the amendment was clearly to give effect to these state laws.

Thus both the grounds of the Miles case have been completely removed. It necessarily follows, we submit, that the Miles decision has been wholly superseded.

By the decision of the Court of Appeals, the Pennsylvania Fair Trade Act has been stripped of all application to interstate sales. This decision will effectually bar any remedy in the Federal Courts of New Jersey, Pennsylvania and Delaware against price-cutting *interstate* sales.

If the Federal courts of the other circuits should follow the construction adopted by the Third Circuit, and hold that substantially similar Fair Trade Acts of all the other states were limited to intrastate sales, the purpose of the Miller-Tydings Amendment would be completely defeated.

If the other Federal circuits should limit the application of these Fair Trade Acts to intrastate commerce, in order to avoid "grave constitutional questions", the Miller-Tydings Amendment would be operating in a vacuum.

The language of the Pennsylvania Fair Trade Act is general. It is broad enough to include both interstate and intrastate sales. No word excludes interstates sales or limits the act to intrastate sales.

The opinion of the Court of Appeals did not discuss the language of the Pennsylvania statute.

We respectfully suggest that no language in the Pennsylvania statute limits its application to intrastate commerce and that the construction of the Court of Appeals is erroneous. If the Court of Appeals had con-

strued the Pennsylvania statute as applicable to interstate sales, an important constitutional question would have been presented and decided and would have furnished the basis for a petition for certiorari.

Conclusion.

The petition for certiorari should be granted.

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